Pemilik Kapal 'Luna Indah' v Admiral Shipping Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–83 OF 1997
GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND ZULKEFLI JJCA
27 JUNE 2005

Civil Procedure — Appeal — Order in chambers — Application in chambers adjourned to next date after order made — Further orders made on next date — Whether order appealed against correctly dated — Whether appeal misconceived and improper

Shipping and Navigation — Action in rem — Arrest of vessel — Bail — Amount of — Whether bail may be fixed at an amount greater than value of vessel arrested

The respondent on 19 November 1996 issued a writ in rem and applied for a warrant to arrest the appellant's vessel — the 'Luna Indah'. The appellant applied to the judge in chambers for leave to provide bail for the release of its vessel. The appellant's bail summons — encl. 16 — came up for hearing before the High Court on 15 January 1997. At the hearing, evidence adduced showed that the 'Luna Indah' was valued at RM520,000. However, after hearing arguments, the High Court judge ordered the release of the 'Luna Indah' on a bail of RM770,000. The judge then adjourned the appellant's bail summons to 31 January 1997 to hear arguments on further orders which he was required to make on such summons. The appellant was dissatisfied with the amount of bail fixed and appealed to the Court of Appeal. The respondent, also dissatisfied with the bail amount, cross appealed contending that the bail amount should be more than RM770,000. The respondent further raised the issue that the appellant's appeal was misconceived because it was directed against the decision of the judge made on 31 January 1997 whereas the order complained of was in fact made on 15 January 1997.

Held, allowing the appellant's appeal with costs and dismissing the respondent's cross-appeal with costs:

(1) The bail summons was not finally disposed of on 15 January 1997 and since what was being sought was a composite order, there was no merit in the respondent's argument that a separate notice of appeal was required to be directed against part of the order made on the summons on 15 January 1997. Both sides had proceeded on the common assumption that the order under challenge was made on 31 January 1997. Indeed, the respondent's notice of cross appeal which complained about the amount of bail being inadequate sought a variation of the order given at the High Court on 31 January 1997. The respondent thus could not say that the appeal was out of order. (see paras 8–9)

(2) As a matter of principle, the owner or charterer or persons interested in a vessel under arrest and who seeks its release on bail cannot be ordered to provide security which is greater than the value of the vessel itself. In the instant case, there was no challenge to the fact that the 'Luna Indah's' value was RM520,000. The High Court judge had therefore misdirected himself by fixing the bail bond at RM770,000. The instant case was therefore one which warranted appellate intervention (see paras 11 & 13).

[Bahasa Malaysia summary

Responden pada 19 November 1996 telah mengeluarkan satu writ in rem dan memohon satu waran untuk menahan kapal perayu — 'Luna Indah'. Perayu telah memohon kepada hakim dalam kamar untuk kebenaran menjamin pelepasan kapalnya. Saman ikat jamin perayu — lampiran 16 — telah dibicarakan di hadapan Mahkamah Tinggi pada 15 Januari 1997. Semasa perbicaraan, keterangan yang dikemukakan menunjukkan bahawa 'Luna Indah' dinilai pada harga RM520,000. Namun, selepas mendengar hujah-hujah, hakim Mahkamah Tinggi memerintahkan pelepasan 'Luna Indah' atas ikat jamin berjumlah RM770,000. Hakim kemudian menangguhkan saman ikat jamin perayu kepada 31 Januari 1997 untuk mendengar hujah-hujah perintah seterusnya yang beliau dikehendaki kemukakan pada saman sedemikian. Perayu berasa tidak puas hati dengan jumlah ikat jamin yang ditetapkan dan merayu ke Mahkamah Rayuan. Responden, juga berasa tidak puas hati dengan jumlah ikat jamin, telah membuat rayuan balas menegaskan bahawa jumlah ikat jamin sepatutnya lebih daripada RM770,000. Responden seterusnya menimbulkan persoalan bahawa rayuan perayu telah disalah tanggap kerana ia telah diarahkan terhadap keputusan hakim yang dibuat pada 31 Januari 1997 di mana penghakiman yang diadukan itu sebenarnya telah dibuat pada 15 Januari 1997.

Diputuskan, membenarkan ryuan perayu dengan kos dan menolak rayuan tuntutan responden dengan kos:

(1) Saman ikat jamin itu tidak dilupuskan pada 15 Januari 1997 dan memandangkan apa yang dipohon merupakan satu perintah komposit, tiada merit dalam hujah responden bahawa satu notis berasingan rayuan itu patut diarahkan terhadap bahagian perintah yang dibuat dalam saman pada 15 Januari 1997 itu. Kedua-dua belah pihak telah meneruskan atas andaian sama bahawa perintah yang dicabar itu dibuat pada 31 Januari 1997. Sememangnya, notis rayuan tuntutan responden yang mengemukakan aduan tentang jumlah ikat jamin itu tidak mencukupi memohon satu perubahan perintah yang disampaikan di Mahkamah Tinggi pada 31 Januari 1997. Responden tidak boleh mengatakan bahawa rayuan itu di luar aturan (lihat perenggan 8–9).

(2) Sebagai satu perkara menurut prinsip, pemilik atau pencarter atau orang yang berkepentingan dalam sebuah kapak yang ditahan dan yang memohon ia dilepaskan dengan ikat jamin tidak boleh diperintahkan untuk memberikan sandaran yang lebih daripada nilai kapal itu sendiri. Dalam kes semasa, tiada cabaran berhubung fakta bahawa 'Luna Indah' bernilai RM520,000.

Hakim Mahkamah Tinggi oleh itu telah salah arah apabila menetapkan bon ikat jamin pada harga RM770,000. Kes ini mewarankan campur tangan pihak rayuan (lihat perenggan 11 & 13).]

Notes

For cases on arrest of vessel, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 941–1106.

For cases on order in chambers, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1215–1218.

Cases referred to

Concord Line Co Ltd v The Owners of the Ship 'Molly' [1997] 4 CLJ Supp 285 (refd)

Legislation referred to

Rules of the High Court 1980 O 70

Bharti Seth (Philip Teoh Oon Teong with her) (Philip Teoh & Co) for the appellant.
Arun Krishnalingam (Mathew Kurien with him) (Sativale Mathew Arun) for the respondent.

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] On 19 November 1996, the respondent ('plaintiff in the court below') issued the writ in rem and then applied for a warrant to arrest the appellant's vessel, the subject matter of this appeal. The vessel is named the 'Luna Indah'.

[3] The facts that form the matrix upon which the action is based are fairly short and undisputed. The 'Emerald Venture' was carrying a cargo of 10,600 cbm logs for transhipment. When it arrived in Lumut, it ran into problems. It got arrested. It also had developed a fault in its hull which required repairs. So the logs in question were transferred to the 'Luna Indah'. Later, all the logs save 122 were reloaded onto the 'Emerald Venture'. For completeness, we would add that the respondent was at the material time charterers of the 'Emerald Venture' and had rights and title to the logs in question. The owners of the 'Luna Indah', the appellant before us, refused to deliver up to the respondents the 122 logs in question. That is what led to the issue of the writ and the arrest which we spoke of a moment ago.

[4] The appellant wanted their vessel released so they applied to the judge in chambers for leave to provide bail upon which condition the vessel was to be released. Their application, marked as encl 16 (the bail summons) in the court file, came up for hearing before the High Court on 15 January 1997. After hearing arguments, the learned judge ordered the release of the vessel 'Luna Indah' and fixed bail at RM770,000. Evidence had been placed before the learned judge that the value of the vessel itself was RM520,000.

[5] The learned judge then adjourned the appellant's summons to 31 January 1997 to hear arguments on the further orders which he was required to make on the bail summons. He made those orders when the matters came before him. We do not propose to say anything about that as it is not the subject matter of complaint before us.

[6] The appellant being dissatisfied with the amount of bail fixed by the learned judge has appealed to this court. The respondent, also dissatisfied with the amount of the bail and complaining that it ought to be more than RM770,000 has cross appealed.

[7] In the argument addressed to us this morning, two issues have emerged for our decision. The first is, whether this appeal is competent in the sense that it is directed against the correct order. The second is whether the learned High Court judge was right in fixing the bail at RM770,000. We will address each of these issues in turn.

[8] On the first issue, it is the submission of the learned counsel for the respondent that the appeal is misconceived because it is directed against the decision of the judge made on 31 January 1997 whereas the order complained of was in fact made on 15 January 1997. We have had our attention drawn to the notes of proceedings before the learned judge and we noticed that the bail summons was not finally disposed of on 15 January 1997. All that happened was prayer 2 of that summons was dealt with and the bail summons itself was adjourned to 31 January 1997. When the matter came up again on 31 January 1997, the nature of the security formed the subject matter of argument and at the conclusion of submission the learned judge made the appropriate orders. As we said earlier, the bail summons was not finally disposed of on 15 January 1997 and since what was being sought was a composite order, we find no merit in the respondent's argument that a separate notice of appeal is required to be directed against part of the order made on the summons on 15 January 1997.

[9] We think both sides proceeded on the common assumption that the order under challenge was made on 31 January 1997. We say this because even the respondent's notice of cross appeal which complained about the amount of bail being inadequate seeks a variation of the order given at the High Court Ipoh on 31 January 1997. It therefore hardly lies in the mouth of the respondent to now say that the appeal is out of order. Indeed, it would be in our judgment wholly unjust and inequitable from a procedural point of view to accede to the submissions made to us this morning on this point. We are therefore of the view that the appeal is properly before us.

[10] That brings us to the second issue. The principles governing the fixing of bail for the release of a vessel under arrest are not in doubt. They are conveniently summarized in the leading text on the subject 'Enforcement of Maritime Claims' by DC Jackson, Lloyd's of London Press Ltd, 1985, wherein at p 183 the learned author had this to say:

> Bail is the substitution of personal for real security. It may be given by a defendant who has acknowledged the issue or service of a writ in rem. In English law bail is given to the court through a bail bond and sureties to the bond. Today it is not much used compared with a guarantee. It takes the place of the ship or other property and may be given initially to prevent arrest of the ship or in order to obtain its release. The security provided cannot exceed the value of the ship but, subject to that limit, a party is entitled to 'sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably best argued case.' It is restricted in its availability and its effect on any claim on the ship to the claim in respect of which it is lodged and therefore represents the ship only in regard to that claimant. It is initially for the claimant to agree to accept an undertaking to give bail as sufficient security and eventually to agree to an acceptable amount. The party seeking security must not abuse his undoubted position of strength and the demanding of excessive bail may lead to a liability for costs. It is for the court to be satisfied as to sufficiency and acceptability of the surety.

[11] It is clear from the foregoing passage that, as a matter of principle, the owner or charterer or persons interested in the vessel under arrest and who seeks its release on bail cannot be ordered to provide security which in amount is greater than the value of the vessel itself.

[12] In *Concord Line Co Ltd v The Owners of the Ship 'Molly'* [1997] 4 CLJ Supp 285, Abdul Malik Ishak J in a careful and well researched judgment on this subject at p 315 said:

> Bail in admiralty proceedings is always identified with the ship. The bail bond is limited to the amount of the ship if the ship is worth far less than the sum of the bond. Even an undertaking to give bail continues to bind if on reliance on it a ship leaves the jurisdiction. It is the practice crystallised through a long line of authorities that the security cannot exceed the value of the ship. *William Henry Smith v Bank of New South Wales, The 'Staffordshire'* (1872) and *The 'Charlotte'* [1920] P 28 are some of the cases that propel themselves to the fore.

[13] In the present instance, there is no challenge evidentially to the fact that the 'Luna Indah's' value is RM520,000. It appears with great respect to the learned judge that he seems to have misdirected himself in point of principle by fixing the bail bond at RM770,000. This then is one of those cases which falls within the class of cases in which appellate intervention is warranted. Based on established principles, we have no doubt but to disagree with the learned judge.

[14] For the reasons already given, this appeal succeeds. The order of the learned judge dated 31 January 1997 fixing bail at RM770,000 is set aside. The bail bond provided by the appellant is hereby cancelled. In its place, the appellant shall within 14 days from today, that is to say, not later than 4pm on 11 July 2005 lodge with the registrar of the High Court, a bond to the sum of RM520,000 in accordance with O 70 of the Rules of the High Court 1980. It follows from what we have said thus far, that the cross appeal cannot succeed. It is dismissed. The respondent must pay

the costs of the appeal, the cross appeal and all costs incurred in the court below. The deposits are refunded to the appellant.

Appellant's appeal allowed with costs. Respondent's cross-appeal dismissed with costs.

Reported by John Paul Simon